WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE VILLAGOMEZ, ***Applicant***

vs.

SIERRA PAINTING COMPANY; BERKSHIRE HATHAWAY HOMESTATE COMPANIES; STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ11290690
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 16, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JOSE VILLAGOMEZ
GLAUBER BERENSON VEGO
LOWER KESNER
STATE COMPENSATION INSURANCE FUND
LAW OFFICES OF NGUYEN & GRIBBLE, LLP

PAG/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Applicant's Occupation:	Painter
	Applicant's Age:	58
	Date of Injury:	June 18, 2016 to June 18, 2017
	Parts of Body Injured:	The condition of Acute Myeloid Leukemia (AML)
2.	Identity of Petitioner:	Oak River Ins. Admin by Berkshire ("Defendant")
	Timeliness:	Yes
	Verification:	Yes
3.	Date of Findings and Award	2/16/22
4.	Applicant's Contentions:	There is no substantial evidence of the latency period

II.
STATEMENT OF THE CASE AND FACTS

This matter was first set for trial on April 14, 2021, before the Honorable Shiloh Rasmusson, now retired. Testimony was taken and documentary evidence admitted into the record. The parties stipulated that the trial would only address issues related to a) injury arising out of and in the course of employment related to the condition of acute myeloid leukemia ("AML") (b) the date of injury pursuant to Labor Code § 5412 (c) the period of liability pursuant to Labor Code § 5500.5, and (d) whether the applicant is entitled to further medical treatment to cure or relieve from the effects of the injury, if found to be industrial.

Following the trial on April 14, 2021, Judge Rasmusson submitted the matter for decision, however, on May 3, 2021, he vacated the submission and set the case for a status conference on June 2, 2021. The Order vacating the submission indicated that the parties were to return the matter to the physicians to obtain supplemental reports to address the period of latency. The status conference held on June 2, 2021 was continued to August 24, 2021. By the time of the August 24, 2021 hearing, the parties had obtained a supplemental report from Dr. Brautbar and had scheduled the CX of the PQME Dr. Sam Ahdab for 9/27/21. A third status conference was set for October 19, 2021, during which the parties indicated that they had completed development of the record, however, as Judge Rasmusson had retired, the case was reset with the PJ, Judge David Brotman, for November 1, 2021, who assigned the case to the undersigned as the trial Judge. At the time of that status conference with the undersigned, the parties stipulated to waive the MSC and instead resubmit the matter for decision as development of the record was complete. No additional testimony was offered; however, additional documentary evidence was admitted into the record. The parties agreed to waive the provisions of Labor Code § 5700 and to allow the current WCJ to consider the record created by the prior Judge. The parties offered supplemental trial briefs and thereafter the matter was submitted for decision.

On February 16, 2022, the WCJ issued a Findings and Award holding that applicant suffered Acute Myeloid Leukemia (AML) arising out of and occurring in the course of his employment. The

Codefendant questioned the date of injury, alleging that the latency period determines the date of injury. The WCJ ruled that there was no substantial medical evidence to find a latency period in this case and Oak River filed a Petition for Reconsideration of that issue on March 15, 2022.

III.
DISCUSSION

Defendant Oak River Insurance Company administered by Berkshire Hathaway Homestate Companies is the Petitioner. They argue that evidence did not justify the Findings of Fact. They also assert that the findings of fact do not support the Order, Decision or Award and that the Order, Decision or Award made and filed by the Judge is in excess of its power by providing an Award of permanent disability not supported by the medical evidence, and an Award of temporary disability not supported by the evidence.

In this case, there has been no finding of permanent disability or temporary disability. The WCJ found that the AML was industrially caused and that applicant was in need of future medical treatment for this condition. Therefore, the Oak River's argument that permanent disability and temporary disability are not supported by the medical evidence is a moot issue as neither PD nor TD have been awarded by the WCJ. This assertion must fail.

Oak River argues that the Findings and Award are not supported by the medical reports of Dr. Brautbar and Dr. Ahdab as neither are substantial medical evidence. However, they only focus on the issue of latency period. There are no arguments disputing the industrial AOE/COE finding as to the AML. Both Dr. Brautbar and Dr. Ahdab indicate that the AML was caused by his 25 year history of working as a painter and being exposed to benzene and other chemicals from the paint. Defendant's arguments do not refute that. Instead, they focus exclusively on the latency period argument. Petitioner states that Dr. Brautbar finds that latency cannot be determined in this case since the applicant has been a painter for his employer for 25 years. Petitioner says that the articles attached to Dr. Brautbar's report offer evidence of the fact that there is a method for finding a latency period. Yet, Dr. Brautbar reports that he cannot determine what the latency period is.

Petitioner has failed to address the methodology for determining the latency period. The fact that a latency period exists for AML cancer in general, does not mean that a doctor can determine when that latency period occurred in this case. In fact, two of the three studies offered by Dr. Brautbar deal with latency for cancers other than AML. Also, knowing the latency period requires information on the amount, extent and duration of exposure. Dr. Brautbar says that the applicant was exposed during the past 25 years and based on that fact, both doctors testified that the AML is due to the exposure during the entire 25 years. There is no other evidence related to the nature or extent of exposure. There are no medical records or exposure reports evidencing any earlier or later periods of exposure. There are no medical reports regarding treatment for symptoms until shortly before his diagnosis. Dr. Brautbar issued a supplemental report stating that as the basis of his finding. In his report of July 8, 2021, Dr. Brautbar comments that latency is not an issue.

"The most important fact in this case is the patient is working in the industry for 25 year. Therefore, the latency period could be up to 25 years long. Some doctors may say it takes 5, 10, 15 years to develop a cancer. Mr. Villagomez had a 25-year history of exposure. In that case, I do

not think latency is an issue here because we do not know exactly what exposure was the cause of his cancer.

There is nothing in his reporting or in his testimony that reflects a lack of substantially. To the contrary, rather than speculate on the latency period and causation, Dr. Brautbar honestly stated that it could not be determined in this case.

His opinion is mirrored by that of Dr. Ahdab who found on his own that the entire period of employment was the cause of his cancer and that the latency period could not be determined with reasonable medical probability. Defendant argues that Dr. Ahdab is displeased with·the bureaucratic process and has a prejudicial view that caused him to fail to make a clear determination of the latency period. Unfortunately, we simply cannot force Dr. Ahdab to provide an opinion when the evidence does not support such a finding. He states several times that in order to do so he would simply be required to speculate. In his deposition of September 27, 2021, he testified as follows:

So that latency question, it's a beautiful question between lawyers, but scientifically, it doesn't make a difference. Because was it his exposure in '93 or 2015 that made it, no one can know. It's just cumulative. The more he was working as a painter, the more he's having risk of developing bad things.

In this case, the WCJ relied on the evidence presented. Both doctors reached the same conclusion regarding latency and there is no rebuttal evidence provided. At trial, Oak River offered a study which was not even reviewed by either of the two doctors. They have now abandoned that study and instead assert that a 5701 evaluation should be ordered. This argument is first made on appeal. The parties have had a prior trial and numerous hearings, however the record shows no discussion regarding a 5701 evaluation or the use of an oncologist. Defendant may not raise this issue for the first time on appeal, particularly since they have had numerous opportunities to develop the record but have not clone so, to their own satisfaction. The WCJ is obligated to consider the evidence presented when the parties indicate that they are ready to proceed. Here, it was at the Status conference that all parties indicated that they were ready to submit the matter, once again, for a decision. Defendant Oak River may not, upon seeing an unfavorable outcome, request more discovery in an effort to rewrite a medical record that has already by thoroughly and completely examined by both a PQME and a treating doctor who reached the same conclusion. Cases demand finality so that the applicant may proceed with treatment. This WCJ has reached conclusions based on the entire record which has been considered. The findings of fact are supported by the medical and documentary record. There is nothing offered to rebut these findings. There are no inconsistent medical opinions for the court to consider here.

In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. Medical reports are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories or examinations or on incorrect legal theories. Medical opinions are not substantial evidence if they are based on surmise, speculation or conjecture. In this case, both doctors avoid speculating on the latency period and explain that they simply cannot reach a conclusion based on the facts of this case. Yet, Petitioner seems to steadfastly request that they do so. A medical report is not substantial

evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. Both Dr. Brautbar and Dr. Ahdab explain that the applicant's long, 25 year exposure is the reason for his cancer and that they are unable to isolate a particular time, space or exposure that triggered the cancer. There is simply no evidence of that. The test of substantiality is measured on the·basis of the entire record. The appeals board may not isolate a fragment of a doctor's report or testimony and disregard other portions that contradict or nullify it; it must give fair consideration to all of the doctor's findings. In evaluating the evidentiary value of medical evidence, the physician's report and testimony must be considered as a whole, not segregated parts. So the entire report and testimony must demonstrate that the physician's opinion is based on reasonable medical probability.

SCIENTIFIC CERTAINTY IS NOT REQUIRED FOR A REPORT TO BE SUBSTANTIAL EVIDENCE

"A medical opinion is not required to be predicated on scientific certainty. In *McAllister v. WCAB*, a firefighter died of lung cancer. The appeals board found that the claim was not compensable because the record did not disclose sufficient evidence as to the toxicity of the smoke inhaled, the amount of the decedent's exposure to smoke or the manner in which smoke inhalation may have caused lung cancer. Specifically, the appeals board found that there was no convincing evidence to show that the smoke firemen commonly inhale contained the same substances as those in cigarette smoke or polluted air, and that the doctor's opinion supporting industrial causation was based on facts not in the record. The California Supreme Court, however, annulled the decision.

The court noted that the doctor reported that it was "probable" that the smoke inhaled contained carcinogens, and that it "may well" contain the same type of carcinogen found in cigarette smoke. The defendant offered no evidence to dispute these conclusions. So the uncontradicted evidence established that the decedent inhaled toxic smoke, and the medical evidence provided that it would be reasonable to assume that the fire smoke inhaled by the decedent caused his death. The court rejected the board's concern that the applicant did not produce a detailed account of the alleged industrial causation, namely the toxicity and amount of smoke inhaled. It noted that such a burden would be unbearable, and required applicants to establish no more than that industrial causation is reasonably probable. The court stated, "Future scientific developments will tell us more about lung cancer. Ultimately it might be possible to pinpoint with certainty the cause of each case of the disease. But the Legislature did not contemplate years of *damnum absque injuria* pending such scientific certainty. Accordingly, we and the Workmen's Compensation Appeals Board are bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or 'convincing.' We must do so even though the exact causal mechanism is unclear or even uncertain.

CONCLUSION

The totality of the evidence demonstrates that the cancer was caused by applicant's employment and exposure to paint and related chemicals at work. Based on reasonable medical probably both doctors make that diagnosis, however neither is able to point to a latency period that is supported by reasonable medical evidence. If we are left to guess and speculate, we cannot rely on the latency period argument as a basis for determining the date of injury. We simply don't have any data to

support a date of injury other than what is found in the record. Symptoms began and a diagnosis was made in June of 2017. Applicant learned that it was work related in April 2018. That is what we know based on reasonable medical probability and substantial evidence, therefore, the date of injury per LC section 5500.5 is one year from the applicant's last date of injurious exposure. His last day of work was June 18, 2017. Therefore the CT claim is from June 18, 2016 to June 18, 2017. There is no rebuttal evidence presented to refute these finding. Based upon the above, I recommend the denial of Petitioner Oak River's Petition for Reconsideration.

DATE: 03/28/22

MARTHA D. HENDERSON
WORKERS' COMPENSATION JUDGE